

February 18. 1766.

A N S W E R S

F O R



JEAN RICHARDSON, wife of *James Moffat* weaver in *Dumfries*, one of the daughters of *Matthew Richardson* younger in *Smallholm*, procreate betwixt him and *Margaret Rae* his spouse,

T O T H E

56

PETITION of *Janet Richardson*, daughter of *Matthew Richardson* in *Oxtart*, and *David Ker* in *Oxtart*, her husband, for his interest; Doctor *James Mounsey*, and *William Kirkpatrick* merchant in *Dumfries*.

BY contract of marriage, of this date, entered into March 2. 1690. betwixt *Matthew Richardson* younger in *Smallholm*, and *Margaret Rae*, daughter of the deceased *Matthew Rae* in *Oxtart*, the said *Margaret Rae*, with consent of *John Ker* in *Oxtart*, her step-father, “ sold, assigned, and
“ dispoſed, frae her, her heirs, executors, and all o-
“ thers, her assignees, to, and in favours of, the said
“ *Matthew Richardson* her promised spouse, and to her-
“ self, and longest liver of them two in liferent, and
“ to the heirs-male or female, ane or mae of the mar-
A “ riage,

“riage, in fee ; which failing, to the said *Matthew* his
 “nearest and lawful heirs or assignies whatsoever, all
 “kindly tenant-right and property, that she has, or
 “can pretend to the said lands of *Oxtart*, and perti-
 “nents of the samen, as only lawful daughter and heir
 “to the said *Matthew Rac* her said father, or otherways
 “howsoever.”

Of this marriage there were three daughters, *Janet*,
Jean, and *Mary*.

Mary intermarried with *James Johnstone* of *Nutholm*,
 and died without any issue. *Jean* (the respondent) in-
 termarried with *James Moffat* weaver in *Dumfries* : And
Janet (the eldest daughter) intermarried with *David Ker*,
 eldest son of *James Ker* in *Smallholm*, one of the peti-
 tioners.

And by the marriage-contract betwixt them, which
 July 9. was entered into, of this date, betwixt *David Ker* and
 1719. *James Ker* his father on the one part, and *Janet Richard-*
son and her said father on the other part, *James Ker* con-
 veyed to, and in favours of the said *David Ker*, his heirs
 and assignees, a tack, renewable at certain terms, for
 ever, granted by the Viscount of *Stormont* to him, “of
 “all and haill these five acres of land of the six pound
 “land of *Smallholm*, with houses, biggings, &c. and
 “the whole pertinents thereto belonging, with the
 “parsonage-tythes allenary ;” reserving to the said
James Ker, and *Janet Wightman* his spouse, the longest
 liver of them two, their liferent-right to the said tack,
 during all the days of their lifetime.

And on the other part, *Matthew Richardson*, in name
 of tocher with the said *Janet Richardson*, sold, analzied,
 and disponed to, and in favours of the said *David Ker*,
 his heirs and assignies whatsoever, heretably and irre-
 deemably,

deemably, the lands of *Oxtart*; reserving to himself, and *Margaret Rae* his spouse, and longest liver of them, the just and equal half of the said lands, during all the days of their lifetime.

Jean (the respondent) got no provision from her father, who having died possessor of effects to a considerable value, independent of the lands of *Oxtart*, the same were intromitted with by the said *David Ker*.

Jean Richardson (the respondent) as one of the two surviving daughters procreate of the marriage betwixt the said *Matthew Richardson* and *Margaret Rae*, apprehending, that she had right to the one half of the said lands of *Oxtart*, and rents thereof, since the death of *Margaret Rae* her mother, which happened about the year 1741, in consequence of the provisions in her father and mother's contract of marriage; so, in prosecution of her right, she was obliged to bring an action before the Court of Session, concluding for reducing and setting aside the disposition of the lands of *Oxtart*, granted by her father in favour of the said *David Ker* in the foresaid marriage-contract 1719, and in so far as regards the half of these lands; in respect that the disposition in favour of the said *David Ker* flowed *a non habente*, *Matthew Richardson* being only a liferenter. 2do, That, supposing *Matthew Richardson* had been fiar of the lands, yet as, by the conception of the contract of marriage betwixt him and *Margaret Rae*, *Jean Richardson* (the respondent) had an equal interest in the lands with her sister *Janet*, and consequently creditor to her father to that extent; so the disposition to *David Ker*, in so far as it respected the one half of the lands, was reduceable, as granted in prejudice of the provision in the marriage-contract.

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This cause was remit to the Lord *Kaims* Ordinary to discuss the reasons of reduction. It will be unnecessary to trouble your Lordships with a full recital of the procedure. It is sufficient for the present purpose to observe, that various defences were stated upon the part of the petitioner; and amongst others, that the respondent's claim was cut off by the negative prescription; all which defences having been repelled by repeated interlocutors of the Lord Ordinary, the petitioner reclaimed to your Lordships upon the same grounds upon which he had insisted before the Lord Ordinary: And when this petition and answers came to be advised, as the petitioner, in bar of the respondent's action, had, among other defences, only pled the negative prescription, without pleading the positive; so it occurred to your Lordships, that, before giving judgment, the point of the positive prescription should likewise be taken under consideration. And

March 3. accordingly, of this date, your Lordships pronounced
1764. the following interlocutor: "The Lords having advised this petition, with the answers thereto, they, before answer, ordain parties to give in memorials upon this point, whether the positive prescription takes place or not."

But, as on account of the respondent's minority, the term of the years of prescription was not run upon *David Ker's* right, and it occurred to her, that it would be unnecessary to trouble your Lordships with a discussion of abstract points of law, when a sufficient answer to the defence did arise from the fact; so, the respondent applied by petition to your Lordships, in order to be allowed a proof of her minority: Upon hearing of which, your Lordships remitted to the Lord Ordinary,
with

with power to his Lordship to call and hear parties procurators thereon, and to do therein as he should see cause.

The Lord Ordinary accordingly granted an incident diligence for proving the respondent's minority; And a proof having been accordingly led and reported, his Lordship, upon advising the same, with mutual memorials, of this date, pronounced the following interlocutor: "The Lord Ordinary having advised the proof Nov. 13. 1765.
" with the mutual memorials, finds the marriage-con-
" tract 1719 to be a good title for the positive pre-
" scription; but that deducing the years of the mi-
" nority of *Jean Richardson* the pursuer, as proved, 40
" years have not run before the date of the present
" process; and therefore, repels the defence of the
" positive prescription." And upon advising a repre-
sentation and answers, his Lordship, of this date, ad- Jan. 16. 1766.
hered.

The petitioner hath reclaimed. The petition is ordained to be seen and answered; and in obedience thereto, these answers are humbly offered.

And here your Lordships will observe, that the contract of marriage betwixt *David Ker* and *Janet Richardson*, is dated 9th July 1719; so that, supposing possession had followed immediately upon the date of the contract, the 40 years was only run upon the 9th July 1759. The present summons was executed upon the 9th May 1761 against Doctor Mounsey, one of the defenders, against *William Kirkpatrick* upon the 21st May, and upon the 25th of May against *David Ker* and *Janet Richardson* his spouse; so that, if the respondent *Jean Richardson*, at the date of the foresaid marriage-contract, was one year and ten months under majority, it is clear, that the prescription was not run against her.

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That

That the respondent wanted more of majority upon the 9th *July* 1719, than one year and ten months, is, with submission, sufficiently proved.

Proof,
page 4.

William Nicholson depones, " That he was born on
" the 8th day of *December* 1701, the deponent having
" been told by his father and mother of this fact; and
" the same is wrote with his father's own hand upon
" a family-bible, which he has at home, and in which
" the names and ages, or days of the births of his
" brothers and sisters are also recorded. And being
" interrogate, depones, That his mother was a mid-
" wife in the barony of the Four Towns of *Lochmaben*
" for 40 years, and was frequently employed in that
" way. Depones, That his mother told him, that she
" was present at the birth of *Jean Richardson* the pur-
" fuer, and officiate as midwife at that time; and the
" deponent was also informed of this by *Elizabeth Rae*,
" now deceased, who was spouse to *Edward Ferguson* in
" *Bush*, who was also present at the birth of the said
" *Jean Richardson*. Depones, That one day as the said
" *Jean Richardson* was going to school in the neigh-
" bourhood of the place where the deponent lived,
" the before named *Elizabeth Rae*, and the deponent's
" mother, having noticed the said *Jean Richardson*;
" and the deponent's mother having observed, that
" she was a better scholar than the deponent, and be-
" ing surprised how that could happen, he then heard
" his mother say, that the said *Jean Richardson* was 11
" months older than the deponent; and the before
" named *Elizabeth Rae* said the same thing. Depones,
" That when he was young, he frequently herded cat-
" tle with the said *Jean Richardson* in the summer-season,
" and

“ and she appeared to have been a girl of about the
 “ deponent’s own age, tho’ she might have been older
 “ than him.”

Upon this deposition, your Lordships will observe, that the witness ascertains his own age with precision and exactness: He says, that he was born upon the 8th *December* 1701; that he was told so by his father and mother, which is all the authority which any person has for a fact of that kind; and that it was so marked upon the family-bible, a very proper and authentic record for the ages of the children of the family. This witness further depones, That he was told both by his mother, who acted as midwife, and by *Elizabeth Rae*, who was present at the birth, that *Jean Richardson* was 11 months older than him. And, as he further depones, That he and *Jean Richardson* were frequently together when young, and that they appeared to be the same age; this affords pretty satisfying evidence, that the account given of *Jean Richardson*’s age by *Elizabeth Rae*, and the witness’s mother, is a just one; and consequently, she was not of age till *January* 1722: So that, at the date of *David Ker*’s marriage-contract, she wanted two years and an half of majority.

And that the account given by this witness of the respondent’s age is a just one, is confirmed by what is deponed to by *John Ker*; after setting furth, that he was perfectly acquainted with *Matthew Richardson*, who was married to a relation of his, depones, “ That, to
 “ the best of his remembrance, the pursuer, *Jean*^{page 6.}
 “ *Richardson*, will be about 63 or 64 years old; and
 “ the deponent was perfectly well acquainted with her
 “ while young.”^{and 7.}

This

This witness's deposition was taken in *October 1764*; so that supposing her then 64 years old, which is the utmost the witness says she was, she wanted above two years of majority at the date of *David Ker's* marriage-contract; and supposing her to be 63 years old, she then would have wanted above three years: And striking a middle betwixt the two, which is the justest method of making up an account from the foresaid deposition, it agrees extremely well with the deposition of *William Nicolson* the former witness.

To these likewise may be added, *Robert Wilson*, who
 Page 17. himself is aged 67 years, and depones, " That *Jean Richardson* must be at least two or three years younger than the deponent; for when he was a good big lad capable of herding, she was only a little girl."

Matthew Richardson, who was examined in *July 1764*, and who would be 61 years of age at *Christmas* then
 Page 2. next, depones, " That he has been acquainted with *Jean Richardson* ever since he knew any thing, or can remember: That when he was about six years of age, he went to the school where the said *Jean Richardson* was also a scholar. And depones, That he has heard *Jean Richardson's* father, and his own father say, that *Jean* was about a year or a year and a quarter older than he the deponent; and that he heard his father and *Jean Richardson's* father say so about the year 1715, when he was at *Holemain's*." And p. 3. letter A, depones, " That he used to be frequently in the house of *Oxtart*, and has heard it there said, that *Jean Richardson* and him were near about an age; but he never asked *Jean* her age: That when *Jean Richardson* and the deponent were at the school, they were much about a size."

In

In a question of this kind, it is not to be expected that witnesses will concur to a day or a month; but the above witnesses do all concur in making the respondent at most 19 years of age at the date of *David Ker's* marriage-contract. The respondent humbly apprehends, that, upon the whole, there must arise sufficient evidence to satisfy your Lordships, that at the foresaid period she was under 19 years of age, which is sufficient to save the prescription from being run; as it has been already observed, that if the respondent then wanted one year and ten months of majority, the prescription was not run, betwixt the date of the contract and the intenting of the present action.

The petitioners say, that little stress can be laid upon *William Nicolson's* deposition; for that, with respect to his own age, he swears only from the authority of a family bible, which is not produced; and that it is not improbable he may have been mistaken in the account he gives of what is contained in that bible. And, that with respect to the respondent's age, he depones only from hearsay, which is by no means ascertained to have been meant or intended as truth by this person who spoke it, being under no obligation to tell truth. Besides, that the hearsay deponed to, happened at a distant period, when he was a boy at school, and that his testimony is single as to the fact.

But there is no room for presuming that this witness was in any mistake as to what is contained in this bible. The fact is extremely simple, in which he could not easily be mistaken; and he swears expressly and positively to this fact.

And with respect to the account given of the respondent's age, it will occur to your Lordships, that in

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ascertaining any fact, such proof ought to be sustained as could reasonably be expected, or as the nature of the thing will admit of; and in ascertaining all facts of an old date, as this is, hearsay evidence becomes of considerable importance. Neither can it be charged to any fault in the respondent, that this fact has become of an old date. She cannot accuse herself of having been guilty of any undue delay in bringing the action. By her father and mother's contract of marriage, which is the foundation of her title, her mother was intitled to the liferent of the subject, and this liferent only determined in the year 1740. But, *2do*, The respondent will be forgiven to say, that it was owing to the fault, if not the fraud of this petitioner, that the action was not sooner brought. This marriage-contract betwixt the respondent's father and mother, upon which her present claim is founded, was all along concealed in the petitioner's custody; in so much, that the respondents never knew she had any such claim, till the lands were lately sold by the petitioners, at which time the marriage-contract came to be spoke of; and the respondent having been accordingly informed of the contents of it, she brought the present action; and the contract itself was accordingly, in the course of the process, recovered upon a diligence out of the petitioners own hands: So that any objection to the darkness or insufficiency of the proof, does now come with a very bad grace from them.

But further, this witness cannot properly be said to be deposing to a hearsay, or a vague report; but he is deposing with precision to the account of the respondent's age that was given by persons who had access

to

to know the same with certainty, *viz.* her own mother, and another person who was present at the birth.

It is a strange doctrine that is maintained in the petition, *viz.* That a person is not understood to be under an obligation to speak truth when not upon oath. Every person is under an obligation to speak truth, whether upon oath or not; and as this witness's deposition does establish, that such account was given of the respondent's age by her mother, and another person present at the birth, your Lordships will, *in re tam antiqua*, give great credit to that account, when it is impossible to figure any reason that the parties could have had to disguise the truth.

It is no objection to the evidence of this witness, that he is single upon the fact. In every circumstantial proof as this is, there is no occasion for two concurring witnesses as to every circumstance. And it will occur to your Lordships, from what has been already stated, that the justice of the account given by this witness, is strongly supported by the depositions of the other witnesses, who concur in making her age much the same with this witness.

The petitioners say, that little can be built upon the deposition of *John Ker*, another of the respondent's witnesses, because he swears only to the best of his remembrance; and that it does not appear that he had any access to know the time of her birth.

The petitioner, in this cause, takes the common and ordinary method of impugning a circumstantial evidence; he attacks every witness separately, and endeavours to show that each of their depositions is inconclusive; whereas it is not upon any single witness that the respondent rests her proof, but upon the whole jointly,

jointly, which she humbly contends, and submits to your Lordships, does afford sufficient evidence, especially *in re tam antiqua*, that the respondent, at the date of the foresaid marriage-contract, wanted more than one year and ten months of majority. Every witness swears, especially in an old fact, to the best of his remembrance. Nor is a witness the less to be credited, that he speaks with a proper degree of caution. The import of the deposition of this witness is, that the respondent, at the time of deponing, was betwixt 63 and 64 years of age, which agrees perfectly well with the account given of it by her own mother, as deposed to by the preceding witness; so that these two depositions strengthen and corroborate each other, and become concurring witnesses, in establishing the point in issue, *viz.* the respondent's age.

The petitioners say, that the oath of *Robert Wilson* makes against the respondent; because, according to it, she must have been 65 years old when he deposed, which was in *October 1764*.

But when this deposition is attended to, no such inference can be drawn from it; for the witness swears, that she must, *at least*, be two or three years younger than himself, which was by no means confining it precisely to that period. The fair import of it is, that she was at least so much younger, whatever more; and by carrying a few months farther than the three years, which is most agreeable to the sound construction of this deposition, it will make her age precisely what is sworn to by the former witnesses. And supposing her only to be three years younger than the witness, which the oath certainly authorises, it will be sufficient to make her more than one year and ten months under majority,

majority at the date of the foresaid contract; which is all that is necessary for the present purpose.

The petitioners say, that according to *Matthew Richardson's* oath, the respondent would be near two years younger than what she is by *Nicolson's* deposition. And this he says is sufficient to discredit both their testimonies.

But in the respondent's humble apprehension, this reasoning is by no means conclusive. In a matter of this kind, it is not to be expected that witnesses will all agree to a few weeks, or even months. And altho' the witnesses founded upon in this case by the respondent, may differ a little as to her precise age; yet they all concur in this, that, at the date of the foresaid marriage-contract, she wanted at least two years of majority; which is more than sufficient for the present purpose: And altho' the discrepancy among the present witnesses, may leave room to doubt how much more she wanted of majority; yet, upon the whole, sufficient evidence must arise to justify the Lord Ordinary's interlocutor, that she wanted so much of majority, as to be a bar to prescription in this case. No more is wanting for that purpose, than a minority of one year and ten months; and all the foresaid witnesses do concur in this, that in this case there is at least a greater minority than two years.

As to the deposition of *Margaret Walker*, founded on by the petitioner, it is of no earthly moment in this cause; she does not know her own age, far less does she pretend to know any thing of the respondent's age. She says, she had no connection with her, and that they were born at different places; the respondent's being either taller or farther advanced in her

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reading,

reading, is no reason for concluding that she was older. Notwithstanding of both these marks, she might have been some years younger than the witnesses.

The like observation will apply to the other witnesses mentioned in the petition. *John Wilson* does not pretend to know any thing of the respondent's age. As to *Mary Wilson*, she swears in express terms, that she knows nothing of the respondent's age. And as to *George Carruthers*, if his deposition amounts to any thing, it is rather in favours of the respondent; for he depones, that, in the 1706, "the respondent was a "little ganging lassie." And altho' he has deponed that he believes he might have said to some people, that the pursuer might have been on the other side of threescore and six; yet it is remarkable, that when he is upon oath, he, in no part of the deposition, hath said that he did truly believe the fact to be so.

And therefore, upon the whole of this proof, it is humbly submitted, if there is not sufficient evidence to satisfy your Lordships, especially *in re tam antiqua*, that there is a minority in this case sufficient of itself to save the right from prescription. The plea upon the part of the petitioner is a most unfavourable one. The respondent's father, tho' only a liferenter, did most unjustly give away to this petitioner the whole of the inheritance in which the respondent had an equal right with her sister, and this fraudulent deed is now endeavoured to be supported by the plea of prescription; and as it has been owing to an unjustifiable concealment that this action was so long delayed, therefore, if there was any thing dark or ambiguous in the proof, it ought to be constructed against the petitioner,
by

by whose fault it has happened that there was any occasion for a proof of minority.

But further, the respondent humbly apprehends, that in this case there is no occasion for founding upon the respondent's minority in bar of the plea of prescription; for your Lordships will observe, that by the marriage-contract of the respondent's father and mother, upon which the present action is brought, her mother was intitled to the liferent of the whole subjects; and as she lived down till the year 1740, so prescription could only begin to run from that period against the respondent. And *2do*, Your Lordships will observe, that, in order to compleat the positive prescription, not only a title, but a continued possession for the space of 40 years, is necessary. In this case, the one half of the subjects continued in the possession of *Margaret Rae* the respondent's mother, till the time of her death, which happened in the year 1740; and therefore it is impossible that this petitioner can, in any view of the case, plead prescription as to this half, which is all the length that the respondent's action does go.

These things were stated in the answers to the representation; but as the petitioner has thought proper to take no notice of them in the petition, it is unnecessary to enlarge further upon them: And upon the whole, the respondent humbly hopes, that your Lordships will have no difficulty in being of opinion with the Lord Ordinary, to repel the defence of prescription.

In respect whereof, &c.

R O. M'QUEEN.



